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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 822

DE MET'S INCORPORATED AND ROBERT E. WOOD,
Petitioners,

vs.

SAMUEL INSULL, JR., C. W. SILLS, H. L. STUART, STANLEY FIELD, EDWARD J. DOYLE, F. K. SHRADER AND JOHN H. GULICK,
Respondents.

REPLY TO RESPONDENTS' ANSWERS TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

REPLY TO RESPONDENTS' ANSWERS TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents say the petitioners have not made an accurate statement of the case, but they do not point out wherein the petitioners' statement is inaccurate.

The respondents say that the complaint in *Gregory* v. *Continental Bank* (R. 58-104), in which action in equity the settlement with the banks was consummated, includes "all the charges against the former directors of Corp. which are made in the complaint at bar, and many more." The former directors of "Corp." (Corporation Securities Co. of Chicago) were not, and could not have been, parties to

that suit, and no relief was, or could have been, sought against them in that suit.

This is an action to recover damages from the directors of Corporation Securities Co. of Chicago, for causing the corporation to pledge all of its assets as collateral security for loans from banks in breach of covenants contained in the Corporation Serial Gold Notes held by the plaintiffs and all others similarily situated.

All that was sought in the *Gregory* case, which was an action in equity, was to recover the collateral pledged with the banks in the Fall of 1930 and the Spring of 1931, or at least to permit the Serial Gold Noteholders to share with the banks in the security of this collateral.

The complaint against the Continental Bank, after stating historical and evidentiary facts to show knowledge by the bank of the rights of the Noteholders by virtue of the covenants in the Serial Gold Notes, prays (R. 95-96):

> "(e) That an accounting should be taken by this Court * * * and that said defendant be decreed to have received said stocks, dividends and accretions with knowledge of the provisions of and in violation of the provisions of the aforesaid Serial Gold Notes * * * and that said defendant may be decreed to surrender * * * such stock, dividends, accretions and assets as shall upon the taking of said accounting, appear to be due and deliverable * * * and to constitute the security for said Serial Gold Notes."
>
> "(f) That said stocks, or the value as aforesaid, be decreed to be subject to a preferred lien and/or to be an equitable trust fund for the benefit of the holders and owners of said Serial Gold Notes."

The complaint against the bank prays also for an injunction against the sale or other disposition of said securities. The complaint did not pretend to seek any relief for the wrong committeed by the directors in inducing breach of the covenants in the Serial Gold Notes. The recitals of

fact in the complaint, referred to by defendants, obviously are to establish notice on the part of the bank in support of the complainant's claim of an equitable right to and interest in the collateral pledged with the bank.

All other matters appearing in Respondents' Answers have been fully met in petitioners' brief in this case. Petitioners here adopt as their further reply to Respondents' Answers the Reply filed by the petitioners in *Aiken* v. *Insull*, No. 823.

Respectfully submitted,

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GEORGE F. CALLAGHAN,
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Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

THOMAS D. AIKEN, et al., Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	**No. 821**
DE MET'S INC. and **ROBERT E. WOOD**, Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	**No. 822**

ON PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOINT PETITION OF PETITIONERS FOR A REHEARING and ALTERNATIVE MOTION TO WITHHOLD FINAL RULING PENDING FURTHER PROCEEDINGS, ETC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

THOMAS D. AIKEN, et al., Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	No. 821
DE MET'S INC. and **ROBERT E. WOOD**, Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	No. 822

ON PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOINT PETITION OF PETITIONERS FOR A REHEARING

and

ALTERNATIVE MOTION TO WITHHOLD FINAL RULING PENDING FURTHER PROCEEDINGS, ETC.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petition for Rehearing.

Now come the above named plaintiffs-petitioners in each of said cases* and jointly petition this Honorable Court for a reconsideration of the orders of February 16, 1942, denying their respective Petitions for Writs of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, and petitioners respectfully pray this Honorable Court to vacate said orders of February 16, 1942, to grant a rehearing and to grant the Writs of Certiorari as prayed in their petitions.

Alternative motion to withhold final ruling pending further proceedings, etc.

In the alternative, plaintiffs-petitioners move this Court to recall its mandate and withhold for at least ninety days the final disposition of said Petitions for Writ of Certiorari pending the disposition of proceedings to be instituted forthwith by plaintiffs-petitioners in the District Court in the so-called bank cases to correct the settlement decrees entered therein, etc., all as more fully described on pages 15 to 20 hereof.

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* Inasmuch as the plaintiffs-petitioners in the DeMet's case (No. 822) adopted the Petition for Writ of Certiorari in the Aiken case (No. 821), the questions involved being practically identical, this petition is being filed jointly by the plaintiffs-petitioners in both cases.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

A clear understanding of the simple question presented by the Petitions for Writ of Certiorari filed in cases Nos. 821 and 822 was undoubtedly prevented by the numerous cross-petitions and briefs filed in cases Nos. 823, 824 and 827, and presented to the Court together with the petitions and briefs filed in these two cases. The cross-petitions and briefs filed in those three cases have no bearing on the instant petitions in cases Nos. 821 and 822.

Petitioners are the plaintiffs in two class suits and represent 17,000 debenture holders of Insull Utility Investments, Inc. (I. U. I.) (Case No. 821) and 5,000 note holders of Corporation Securities Co. (Case No. 822), who are scattered throughout the United States. Petitioners take this last opportunity, afforded by Rule 33 of this Court, to obtain justice in behalf of themselves and the class they represent and respectfully ask this Court to give further consideration to an extraordinary situation which clearly calls for the exercise of this Court's jurisdiction.

In a number of instances, upon the filing of petitions for rehearing, this Court has seen fit to re-examine petitions for certiorari previously denied, to vacate its previous orders and thereupon to grant certiorari where the ends of justice require it. (Roberston and Kirkham, "Jurisdiction of the Supreme Court of the United States" (1936), Sec. 288, note 68, and cases cited.)

In *United States* v. *Boston Insurance Co.*, 269 U. S. 197, where this Court, on petition for rehearing, reversed its previous ruling, this Court said, in the course of the opinion:

> "Upon a re-examination of the record it becomes plain that we misapprehended the opinion and ruling of the lower court; also that the reason advanced to support our conclusion is insufficient. * * *"

Resumé of essential facts reveals that the expressed intention of the settling parties in the bank cases was to preserve the causes of action against directors which is the subject matter of the instant suits.

A statement of the essential facts appears on pages 1 to 7 of the Petition for Certiorari in case No. 821 and pages 1 to 5 of the Petition for Certiorari in case No. 822.

The respective directors of the two companies in question, defendants in these two cases, caused their companies to issue and sell to the public (including plaintiffs) large amounts of unsecured obligations; two series of debentures aggregating $66,000,000 by I. U. I. and serial gold notes aggregating $35,000,000 by Corporation Securities Co. Both of these corporations were investment trusts, whose purpose was to buy and hold securities of Insull operating companies with which defendants were also connected. These debentures and notes each contained covenants prohibiting the pledging by the companies of any of their property unless the debentures and notes were equally and ratably secured by the instruments of pledge. (Aiken R. 3-16; De Met's R. 3-11.)

Notwithstanding these covenants, the defendant-directors caused to be pledged virtually all the assets of the corporations to certain Chicago and New York banks as

security for loans and caused the covenants to be breached by failing to provide any security whatever for the debentures and notes. (Aiken R. 24-33; De Met's R. 10-11.)

After these corporations went into bankruptcy in 1932, the debenture holders and note holders each filed two sets of suits, one against the banks and the other against the directors. The suits against the banks charged the banks with notice of the covenants and sought equitable relief to require the banks to share their security with the debenture holders as required by the covenants in the debentures and notes. (Aiken R. 6; 12, 86-114, 124; De Met's R. 106-110.)

The litigation against the banks was terminated by an oral agreement between the representatives of the plaintiffs and the banks, subject to the approval of the Court, under which the banks paid into court a sum which yielded about four cents on the dollar to the debenture holders and note holders. The debenture holders and note holders did not execute any written instrument of settlement. The termination of the bank litigation was accomplished by the decrees and orders entered by the District Court at Chicago, after notice to the members of the class and hearing, whereby the Court approved the settlement, on the terms and conditions set forth in its findings of fact, as fair and equitable, and permanently enjoined the further prosecution of the suits. (Aiken R. 136-138, 232-239, 143, 144, 148-162, 115-199, 170-173; De Met's R. 125, 239-242.)

Of paramount importance to the cases at bar is one of the conditions of the agreement of settlement, made a part of the findings of the Court in the bank cases, that nothing contained in the agreement should be construed to operate as a release or to affect any cause of action

of the debenture holders and note holders against the directors (defendants in the instant suits). (Aiken R. 143, 166; De Met's R. 131.)

The instant suits against the directors, which were pending at the time of the so-called settlement with the banks and before the same Judge of the District Court who entered the orders in the bank cases, seek an accounting and damages against the defendant-directors for causing the corporations to violate the covenants of the debentures and notes. (Aiken R. 2-39; De Met's 2-16.)

After the so-called settlement with the banks was consummated, the defendant-directors filed motions for summary judgment for the defendants (under Rule 56) on the ground that the so-called settlement with the banks constituted a release of the banks and automatically operated to release the defendant-directors on the theory that the banks and the defendant-directors were joint tortfeasors. (Aiken R. 74-195; De Met's R. 56.) The plaintiffs filed verified answers, the allegations of which were admitted by the defendants. These answers set forth the negotiations and the oral agreement between the representatives of the debenture and note holders and the banks, the intention of the plaintiffs and the banks not to release the directors and the intention of the parties to give the banks no more than a covenant not to sue and further stated that the reservation clause was inserted for the purpose of evidencing that intention. The plaintiffs' answers further alleged that the payment by the banks and all the dividends paid to the plaintiffs in the bankruptcy case yielded less than 10% of the principal amount of debentures and notes and that the plaintiffs had not received full satisfaction for the injuries sustained by them as the result of the wrongful acts of the defendants.

(Aiken R. 229-241, 279, 281, 289; De Met's R. 239-245, 271-274, 285-288.)

The District Court granted the summary judgments barring plaintiffs from further maintaining these suits against the directors and the Circuit Court of Appeals affirmed the judgments. (Aiken R. 320, 364; De Met's R. 316, 359.)

I.

The fundamental question involved is whether the established Illinois rule that so-called releases must be construed to carry out the expressed intention of the parties, is limited to contract liability and does not apply to tort liability.

The only controversy involved is whether the Circuit Court of Appeals correctly held, under Illinois law, that the so-called settlement with the banks of their liability for having accepted the pledges bars further suit against defendants for having induced the wrongful pledging.

While ten questions are enumerated in our Petition for Writ of Certiorari (Aiken Pet. pages 7-10), the principal question is:

Under Illinois law, assuming that the banks and director-defendants were joint tort-feasors, did the so-called settlement with the banks in consideration of part payment, operate to discharge the director-defendants also, in spite of the fact that it was the intention of both settling parties that it would not have that effect, and that such intention was expressed in a written reservation which was a condition of the so-called settlement? (Questions 1-3, 9-10, Aiken pet. pp. 9-10.)

The Illinois law on the point is as follows:

1. The Supreme Court of Illinois in 1867 held, in a case involving release of joint debtors (*Parmelee* v. *Lawrence,* 44 Ill. 405), that releases, like all other written instruments, must be construed according to the intention of the parties, and where the intention of the parties not to release others jointly liable is expressed as a proviso of the release, such intention must be given effect. That Court further held that in order to give effect to the intention of the parties, in a suit against the others, the release shall be construed as if it were only a covenant not to sue, leaving the rights of the parties to the release unimpaired, except for the obligation of the releasor not to assert any further claims against the releasee. In that case the court specifically overruled the earlier Illinois cases which refused to give effect to the proviso on the ground that it was repugnant to the release. (Aiken pet. pp. 21-22.)

2. In all the numerous cases subsequent to 1867 involving contract liability, both the Supreme Court of Illinois and the Appellate Court of Illinois have followed the principle laid down in *Parmelee* v. *Lawrence.* (Aiken pet. pp. 22-23.)

3. Neither in the *Parmelee* case nor in any of the subsequent cases did the courts indicate that the principle was limited to contract cases only.

4. The rule of the *Parmelee* case was specifically held to be applicable to tort situations in two Illinois cases.

In the case of *City of Chicago* v. *Babcock,* 143 Ill. 358, 367, involving the question whether the payment of a sum of money by one of several *joint tort-feasors,* in consideration of an agreement not to sue further constituted, in view of surrounding circumstances, an accord and

satisfaction, the Supreme Court of Illinois discussed the subject of the law of release of joint tort-feasors at considerable length. In that case the Supreme Court of Illinois held that the intention of the parties was controlling and stated that among the cases supporting the views which it expressed is *Parmelee* v. *Lawrence,* 44 Ill. 405.

In the case of *Van Meter* v. *Gurney,* 251 Ill. App. 184, the Court relied on the *Parmelee* case in holding that a release given to one of two *joint tort-feasors* after judgment, did not release the other where the instrument contained a reservation of the right to proceed against the other.

II.

The independent judgment of the Circuit Court of Appeals was that effect should be given to the expressed intention to preserve the cause of action against the defendant-directors. The conflict between its decision and the local law results from a plainly mistaken belief by the Circuit Court of Appeals that the Illinois Courts have refused to apply the Parmelee principle in tort cases.

The decision of the Circuit Court of Appeals cannot be justified as a permissible decision predicated on an absence of applicable local decisions, as was involved in *MacGregor* v. *State Mutual Life Assurance Co.,* 86 Law Ed. Advance Opinions, page 559. On the contrary, the opinion of the Circuit Court of Appeals plainly indicates that (in the absence of applicable local decisions) *if the question had been left to that court to decide according to its own independent judgment, it would have given effect to the reservation.*

The Circuit Court of Appeals characterized the so-called rule that the release of one joint tort-feasor releases all irrespective of the intent of the parties as a "technical" and "harsh rule". The court described the formula of the *Parmelee* case as "this wholesome and common sense formula" and as "the superior view". The court expressly stated that it saw no good reason for drawing a distinction between joint tort-feasor cases and joint debtor cases. It appears therefore that if the situation in the case at bar is considered as if there were a complete absence of Illinois decisions on the question as to whether the *Parmelee* rule is applicable in tort cases, then the Circuit Court of Appeals would have reversed instead of affirmed the decision of the District Court. (Aiken R. 356, 357.)

The burden of our petition is that while the Circuit Court of Appeals recognized that it was its duty to follow the local law, it made a serious mistake in appraising the data with respect to the Illinois law. The mistake of the Circuit Court of Appeals was that it misapprehended the holding in three Illinois cases (hereinafter discussed) upon which it relied, in concluding that while the *Parmelee* rule ought to apply in tort cases, the Illinois courts have limited that formula to contract cases and have refused to extend it to tort cases, and that in tort cases a release of one releases all irrespective of the intent.

There is no room for difference of opinion as to what the three cases relied on by the Circuit Court of Appeals actually held. They are not even germane. In none of them was there involved a release of one with a reservation as to the others. In none of them is that subject discussed. In none of them was there involved the question as to the expressed intention of the parties. The

three cases involve only the application of the general rule of release in respect to an ordinary unqualified release. There is every inference in the three cases that if they contained the factors involved in the instant cases, the decisions would have been different. The task of this Court will simply be to determine whether the Circuit Court of Appeals properly construed these three cases. We will again discuss these three cases briefly.

In *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, there was no written instrument and there was no reservation of the cause of action against the other joint tort-feasor. The Court held that the other joint tort-feasor was discharged because the only evidence in the record was oral testimony that payment had been received in full satisfaction from one of them and there was no evidence to negative the implication of a complete accord and satisfaction. The Court specifically stated that if there was a contrary intent, the burden was on the releasor to produce evidence thereof.

In *Gilbert* v. *St. Louis R. R.*, 220 Ill. App. 51, the Court merely held that a formal written release containing no qualifications also discharged joint tort-feasors.

In *Stanley* v. *Leahy*, 87 Ill. App. 465, the Court held that a replication to a plea of release was demurrable where it stated merely that the releasor did not intend an unqualified release of one to release the others. That statement in the replication was obviously only a self-serving statement since it failed to state that the intention was expressed in the release agreement. The holding in that case does not mean that a different rule is applied in tort cases from contract cases because even in contract cases following the *Parmelee* rule, the Illinois courts hold that an unexpressed intention to reserve

a cause of action against others has no effect. (*Clark* v. *Mallory*, 185 Ill. 27.)

This illustrates how mistaken the Circuit Court of Appeals was in believing that the Illinois courts have refused to apply the *Parmelee* rule to tort cases.

It is plain that the Circuit Court of Appeals misapprehended these three cases. There is no case in Illinois which supports the Court's erroneous holding as to the Illinois law. Since the Circuit Court of Appeals reluctantly affirmed the decision of the District Court only because of its mistake as to those three cases, this Court should grant certiorari so as to correct the error and prevent the confusion as to Illinois law resulting therefrom.

III.

Practical considerations of great importance in the administration of justice require a review by this Court to settle the conflict between the decision of the Circuit Court of Appeals and the Illinois law.

The effect of the decision of the Circuit Court of Appeals is to create a direct conflict with *Parmelee* v. *Lawrence*, 44 Ill. 405, as approved by the Illinois courts in tort cases. (*City* v. *Babcock*, 143 Ill. 358, and *Van Meter* v. *Gurney*, 251 Ill. App. 184.) Therefore, parties in Illinois in considering the validity of a release of one of several joint tort-feasors with a reservation as to the others, will not know whether to rely on the doctrine of *Parmelee* v. *Lawrence*, as approved in *City* v. *Babcock*, and *Van Meter* v. *Gurney*, *supra*, or whether to rely on the decision of the Circuit Court of Appeals. This presents a very serious situation which this Court

has repeatedly held to be ground for certiorari in order to resolve the conflict.

In *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 Law ed. 139, this Court described questions concerning conflict between a Court of Appeals and a State Court on local questions as "questions of public importance concerning the interrelation of State and Federal Courts" (p. 143).

In *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 Law ed. 109, this Court said at page 114:

> "The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of State law for litigants in the State Courts and another rule for litigants who bring the same question before the Federal Courts owing to the circumstance of diversity of citizenship."

In the proper administration of justice it is highly important for this Court to review the case at bar, not merely because of the general importance of establishing a uniform rule of State law whether the question is in the State Courts or in the Federal Courts, but in the case at bar there are "practical aspects" which enhance the importance of resolving the present conflict, namely:

(1) The effect will be disastrous on the rights of the 22,000 claimants in these suits who relied on the local law as interpreted by the settling parties and by the United States District Court which approved the bank settlement with the reservation as a condition. These parties are now deprived of one of the considerations for their acceptance of the settlement with the banks and are deprived of a benefit expressly provided in their agreement and confirmed to them in the decree of the trial judge in the bank settlement proceedings.

(2) Unless this Court reviews the case and settles the question, the decision of the Circuit Court of Appeals will have the effect of unsettling the Illinois law, and of discouraging the use of the form in question so that it will be unlikely that the Illinois Courts will ever have the opportunity to settle the question. The result will be that this wholesome and common sense method of compromise will be discouraged in tort cases purely because of a plain mistake of the Circuit Court of Appeals.

In view of the decision of the Circuit Court of Appeals plaintiffs in tort cases in Illinois would in the future be unwilling to rely upon the *Parmelee* doctrine as approved in the *Babcock* and *Van Meter* cases, because they would be fearful that if the release should be presented to a Federal Court upon grounds of diversity of citizenship, the Federal Court would follow the decision of the Circuit Court of Appeals in this case.

Furthermore, the decision of the Circuit Court of Appeals, coupled with the refusal of this Court to grant certiorari, would obviously deter the use of this form of release even though parties desiring to use it realized that it was still in the power of the Illinois courts to abrogate the effect of the decision as a precedent. The result of this uncertainty would be that the form of release under discussion would not be used in tort cases and therefore there would never be any likelihood of the Illinois courts passing upon the question. In that way what has appeared to be the rule in Illinois since 1867 will have been nullified and the "wholesome and common sense formula" discarded in tort cases.

Thus confusion and misapprehension must result and compromises probably discouraged unless the conflict is reconciled or abated by this Court.

ARGUMENT IN SUPPORT OF ALTERNATIVE MOTION TO RECALL MANDATE AND WITHHOLD RULING PENDING DISPOSITION OF FURTHER PROCEEDINGS IN DISTRICT COURT IN THE SO-CALLED BANK CASES.

The decision of the District Court and the affirmance of that decision by the Circuit Court of Appeals are based on the conclusion that the language of the decree approving the settlement of the bank litigation constituted a release of the banks rather than a covenant not to sue them; and that the clause purporting to give it the effect of a covenant not to sue and preserve the cause of action against directors was repugnant to such release and could be given no effect. It was conceded that if the language of the decree provided for no more than a covenant not to sue, it would not operate to release the defendant-directors. It was only because the lower courts in the instant suits against the directors construed the decrees in the bank cases to constitute releases that they decided that the defendant-directors were also released.

The sworn Answer on the Facts filed below (Aiken R. 229-239) and the affidavit of counsel attached hereto make it clear that in making the settlement it was the intention of the parties to the settlement, that is, the representatives of the debenture and note holders and the banks, merely to terminate the litigation against the banks and not to release them. It was the agreement and intention of the settling parties that the decree submitted to and approved by the court should not release the banks and should only have the effect of a covenant not to sue so as to preserve the cause of action against the directors. This was also the intention of Judge Wilkerson, Judge of the District Court at Chicago, who approved the settlement. Judge

Wilkerson approved the settlement as fair and equitable on the conditions stated in the settlement petition and his Findings of Facts, one of which was that nothing therein contained or referred to should be construed to operate as a release or to affect the cause of action against the directors. (Aiken R. 143, 166; De Met's R. 131.) Judge Wilkerson could not have found the settlement fair and reasonable to the debenture and note holders had he considered that the language reserving the cause of action against the directors constituted mere words having no meaning or value.

The decisions below in these suits against the directors indicate that, in the opinion of those courts, despite the care exercised by the parties and the court in the bank cases in the wording of the decree so as to express the intention of the parties to preserve the cause of action against the defendant-directors, the proper technical words were apparently not used to effect the intention of the parties. If the language in the settlement decree and collateral papers were revised so as to more fully and accurately express the intention of the parties, it would become obvious and beyond any possible doubt that the District Court in the bank settlement cases did not decree and did not intend to decree anything which could be construed to release the directors and would establish that the plaintiffs have retained their cause of action against the defendant-directors.

There can be no question about the intention of the parties. It is absurd to believe that Judge Wilkerson, in approving the settlement with the banks in a class suit filed in behalf of all creditors, inserted in the settlement decree and findings a clause, as a condition to

his approval of the settlement, reserving the cause of action against the directors *without intending that that clause should be given effect.* On the contrary, it must be evident that the plaintiffs and Judge Wilkerson would not have approved the settlement with the banks had it not been for the conditions that the debenture and note holders would still have the right to prosecute their suits against the director-defendants. A proposal by the banks which would have discharged the defendant-directors was rejected by the representatives of the debenture and note holders unless the directors would pay a substantial sum in addition to that to be paid by the banks. This they refused to do. (Aiken R. 236-237, Pars. 43-49.)

The construction placed by the lower courts in these cases on the settlement decree and findings in the bank settlement cases works a fraud on the debenture and note holders and frustrates the intention of the settling parties and of Judge Wilkerson. Pursuant to the order of Judge Wilkerson, notices were sent to the debenture and note holders throughout the United States in which it was stated that one of the conditions of the settlement was that the cause of action against the directors was being preserved. The debenture and note holders knew Judge Wilkerson would scrutinize closely the terms and conditions of the settlement and that he would not approve a settlement in a class suit unless he believed it to be a fair and equitable settlement with the banks for the benefit of the entire class.

The procedure in effecting this settlement was the same as prescribed by this Court in Rule 23(c) of the Rules of Civil Procedure. When a settlement is made in a class suit which is binding upon tens of thousands of persons not before the court, this Honorable Court has recognized,

by its promulgation of Rule 23(c), that a compromise should not be permitted to be made except upon the approval of the court. If the intentions of the court approving such a settlement in a class suit are now to be ignored, these absent parties are deprived of the protection intended by the Rule.

Therefore, if the settlement decree and findings filed in the bank suits do not contain the technical language considered necessary by the lower courts in the instant cases to carry out the intention of the parties and preserve the cause of action against the defendant-directors, those decrees and collateral papers should now be revised and corrected by the court which entered them in order to speak the intention of the parties more fully and accurately, and in accordance with their intention, meaning and understanding, and in accordance with the construction placed on them by the parties to the bank settlement cases. Otherwise a gross injustice will have been done as a result of a mistake in the wording of a decree.

With that in mind, the plaintiffs intend to take steps immediately, in the suits against the banks in which the settlement decree and findings were filed and approved (*Celia Kelly* v. *Continental Illinois National Bank and Trust Company of Chicago, et al.*, No. 12357, Aiken R. 115, and *William W. Gregory* v. *Continental Illinois National Bank and Trust Company of Chicago, et al.*, No. 14412, De Met's R. 58) to revise such decrees. The plaintiffs intend to promptly proceed in the District Court where the bank settlement cases are still open and pending for certain purposes and move the District Court at Chicago to revise the settlement decrees and supplemental papers in order to have such decrees and supplemental papers include whatever technical language be required in order to preserve the cause of action against the defend-

ant-directors. When such revisions are made, it will become manifest that the motion by the defendants for summary judgment on the ground that the banks were released and that resulted in the release of the defendant-directors, must be overruled and that the decree of the District Court sustaining the motion for summary judgment, which decree was affirmed by the Circuit Court of Appeals, must be set aside.

If this Court should make a final disposition of the Petitions for Certiorari filed in Cases Nos. 821 and 822, it might be too late for the plaintiffs to gain any benefit from a revision of the decrees aforesaid. It is consequently important that this Court retain jurisdiction of the instant cases, recall its mandate which was issued upon the denial of the Petitions for Certiorari heretofore filed herein and withhold the final disposition of the Petitions for Certiorari until the plaintiffs have a reasonable opportunity to obtain a revision of the settlement decrees and supplemental papers in the bank suits to conform more effectively to the actual agreement, intention, meaning and understanding of the parties to such settlement. Upon such revision being accomplished, we shall then be in a position to ask this Court to grant the Petitions for Certiorari heretofore filed and either to reverse the judgments below or to remand the suits for further proceedings in view of the important change in facts resulting from the revision of the settlement decrees subsequent to the entry of the judgments below. We ask this Court to take this action in accordance with the familiar rule stated in Robertson and Kirkham on Jurisdiction of the Supreme Court of the United States (1936), page 559:

> "It is also not uncommon for the Supreme Court to withhold its ruling upon a petition for certiorari

> until the happening of intervening events shall have assisted in a determination of the question whether the writ should issue."

Under the broad powers of this Court to grant certiorari, there should be no doubt about this Court's jurisdiction to grant this motion in the interest of justice.

A short delay in the final disposition by this Court of these cases can cause no harm. If this Court should make a final disposition of the Petitions for Writ of Certiorari and deny this Motion, it would result in the termination of this phase of the litigation. A delay for a reasonable time in order to enable the plaintiff to adopt the action described above would therefore not result in prejudice to the defendants.

We cannot overemphasize the importance of these cases not only to the thousands of debenture and note holders whose investments were ruined by the defendants' violation of covenants in their debentures and notes but also to the people of the State of Illinois who have been condemned by the Circuit Court of Appeals to an admittedly harsh and technical rule as the result of a misunderstanding by the Circuit Court of Appeals of three decisions of the Illinois courts.

CONCLUSION AND PRAYERS FOR RELIEF.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted and that the orders of this court entered on February 16, 1942, denying the Petitions for Writ of Certiorari filed by the plaintiffs in these two cases, be vacated and that said Petitions for Writ of Certiorari be granted.

In the alternative, it is respectfully urged that the foregoing Motion to recall the mandate, etc. be granted and that this Court withhold its ruling and retain jurisdiction of these suits and enter such further orders from time to time as may serve the ends of justice.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Edmund D. Adcock, one of the counsel for the above named Plaintiffs-Petitioners, do hereby certify that the foregoing Petition for Rehearing and the foregoing Motion are presented in good faith and not for delay.

EDMUND D. ADCOCK,
One of the Counsel for Plaintiffs-Petitioners.